No. 91-896

In The

Supreme Court of the United States

October Term, 1991

EDITH PERRY,

Petitioner,

vs.

COMMAND PERFORMANCE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

In this Section 1981 action, petitioner, who is black, alleged that the respondent beauty salon (the "Beauty Salon" or "respondent") denied her service on the basis of race. Following a non-jury trial in February, 1991, the trial court found that

petitioner failed to prove intentional discrimination by the Beauty Salon. On September 11, 1991, the Third Circuit Court of Appeals affirmed the decision of the trial court, without opinion.

COUNTER-STATEMENT OF THE FACTS

Prior to October 12, 1987, petitioner, who is black, was a regular customer at the Beauty Salon. Plaintiff was regularly served by both black and white hair stylists at the Beauty Salon without incident. Contrary to the petition, the Beauty Salon actively solicited black patronage and there was no evidence that the Beauty Salon ever employed a "whites only" hair stylist.

On the morning of October 12, 1987, petitioner arrived at the Beauty Salon for a scheduled appointment. She was greeted by the manager, who was white. The manager said that she had caught a cold and asked petitioner whether she would mind if the other hair stylist on duty served petitioner. However, when the other hair stylist on duty, Elizabeth Abbott ("Abbott"), was called over to petitioner, she stated, "I don't do black hair". Abbott had recently moved from New Hampshire and testified that she had little experience doing black hair. Abbott had worked at the Beauty Salon only about one month at the time of the incident.

The manager repeatedly offered to do petitioner's hair herself, but petitioner refused. The manager assisted petitioner in attempting to call the owner of the Beauty Salon and, thereafter, in having petitioner's husband called to the Beauty Salon. After the arrival of petitioner's husband, petitioner left the Beauty Salon.

Following the incident, Richard Glover ("Glover"), the president and owner of the Beauty Salon, immediately travelled to the Beauty Salon to investigate the matter. He obtained statements from both hair stylists on duty. Throughout the incident

and subsequent investigation, Abbott insisted that her refusal to serve petitioner was based only on her lack of confidence in doing black hair.

As a result of the incident, the Beauty Salon immediately took several steps to remedy the situation. On October 15, 1987, Richard Glover's wife, Meredith Glover, addressed a letter of apology to petitioner which stated, in part, "we value your patronage and good will and hope that we can continue to serve you in the future". A $50.00 gift certificate was enclosed with the letter. Petitioner acknowledged receiving the letter and admitted she had no reason to think that it was not sincere.

In addition, a letter of reprimand was addressed to Abbott. The letter provided for a "plan of action to assist Abbott in learning proficiency with black hair styles." The letter stated in part, " 'I don't do . . .' is not a part of our vocabulary at Command Performance, and you should eliminate it from yours."

Shortly after the incident on October 12, 1987, Abbott resigned from her employment with the Beauty Salon.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE PETITION, THE LIMITS OF *PATTERSON v. MCLEAN CREDIT UNION* IS NO LONGER AN IMPORTANT QUESTION OF FEDERAL LAW.

In her petition for writ of certiorari, petitioner argues that the Supreme Court should grant certiorari in this case to review the limits of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), holding that Section 1981 applies only to "post-contract formation" conduct. The lower court relied, in part, upon

Patterson in concluding that petitioner's race discrimination claim was not actionable under Section 1981 because it involved "post formation" conduct.

Section 101 of the Civil Rights Act of 1991 (the "1991 Act") amended Section 1981, in pertinent part, as follows:

> "(2) By adding at the end the following new subsections:
>
> (b) for purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> * * *

Thus, § 101 of the 1991 Act reverses the decision of this Court in the *Patterson* case. As a result, the limits of *Patterson* are no longer an important question of federal law.[1]

Moreover, based upon the facts as found by the trial court, it is clear that *Patterson* was correctly applied in this case. Upon petitioner's arrival at the Beauty Salon, respondent's manager confirmed that the service scheduled to be performed for petitioner by the manager would be rendered to petitioner, although by

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1. Petitioner does not argue that the 1991 Act should be applied retroactively to this case. By its terms, of course, the 1991 Act "takes effect upon enactment." *See* 1991 Act, § 402(a). *See also, U.S. Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908) (holding that a statute "ought not to receive [retroactive] construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied").

another hair stylist, and petitioner agreed. The services to be rendered were clearly defined and petitioner had impliedly agreed to pay the standard fee. Since Abbott's actions occurred only afterwards, it is clear that petitioner's claims related to "post formation" conduct. No basis whatever exists for petitioner's argument that *Patterson* should apply exclusively to Title VII cases.

II.

NO IMPORTANT QUESTION AS TO THE APPLICATION OF *RESPONDEAT SUPERIOR* IS IMPLICATED IN THIS CASE.

In the alternative, the trial court found that, under the facts of this case, petitioner failed to prove discriminatory intent on the part of the Beauty Salon. Under § 1981, plaintiff must prove actual discriminatory intent to establish a prima facie discrimination claim. *General Building Contractors v. Pennsylvania, et al.*, 458 U.S. 375 (1982).

Contrary to petitioner's statement of the facts, Abbott had only recently been hired by the Beauty Salon. No evidence was presented that she had previously refused to serve a black customer. On the contrary, it was obvious that the manager fully expected Abbott to serve the petitioner when she was requested to do so.

Contrary to petitioner's statement of facts, the Beauty Salon had no history of employing a "whites only" hair stylist or of referring all black patrons to a black hair stylist. Indeed, petitioner herself was served by both black and white hair stylists during the time that she was a regular customer.

It is also clear that the Beauty Salon took immediate, concrete steps to give Abbott the additional training she claimed she needed to serve black customers. The letter of reprimand which the Beauty

Salon issued to Abbott required her to undertake a "plan of action" to address the situation. As a result, the lower court correctly found that there was no evidence whatever of any racial animus on the part of respondent's officers or managers.

Under the somewhat unusual facts of this case, the lower court correctly found that the offending employee's discriminatory actions comprised "an isolated incident, and did not approach the level of pervasive discrimination such that the defendant should have known of Ms. Abbott's discriminatory behavior and taken steps to prevent it." (App. 42, paragraph 14).

Many circuit courts have found that the doctrine of *respondeat superior* applies to employers under § 1981 or Title VII *only* where the employer knew or should have known of the discriminatory propensity of a non-supervisory employee. *See Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989); *Hunter v. Allis-Chalmers Corp., Engine Division*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Levendos v. Stern Entertainment*, 909 F.2d 747 (3d Cir. 1990).

Despite petitioner's repeated misstatements to the contrary, there is absolutely no evidence that the manager had any involvement whatsoever in Abbott's actions. When Abbott refused to serve petitioner (whether because of her claimed lack of experience or because of racial animus), the manager immediately offered to serve petitioner herself. This offer was declined. Since it is obvious that the manager expected Abbott to serve petitioner and took prompt action to remedy the situation, it is clear that the district court correctly found that there was no basis for applying the *respondeat superior* doctrine in this case.[2]

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2. Many of the lower court decisions referred to by petitioner are inapposite (Cont'd)

CONCLUSION

It is clear that petitioner's contention that this case presents important issues under the civil rights laws is ill-founded. At most, this case involved an isolated incident, without precursor, and which the evidence showed was immediately disavowed by the Beauty Salon. Even if *Patterson* had any continuing viability (which it certainly does not), there are no special or important reasons for the grant of certiorari in this case. Accordingly, the petition should be denied.

Respectfully submitted,

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(Cont'd)

here because the court was merely passing upon a motion for summary judgment. Obviously, whether the application of *respondeat superior* may be disposed of by summary judgment is not an issue in this case. *See, e.g., Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990); *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243, (D.D.C. 1990).